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No. 97-583

In the Supreme Court of the United States

OCTOBER TERM, 1997

AMERTEX ENTERPRISES, LTD., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The standard changes clause in government contracts authorizes the government to make changes unilaterally within the general scope of the contract, subject to an equitable adjustment in price, delivery schedule, or both. Under the cardinal change doctrine, however, if a change is so drastic that it effectively requires the contractor to perform duties materially different from those bargained for, the government has breached the contract. The question presented is:

Whether petitioner may bring a cardinal change claim based on the government's unilateral modifications to its contract with petitioner, even though petitioner, with full knowledge of those changes, thereafter entered into bilateral modifications that altered the contract's delivery and payment terms and implicitly incorporated the prior unilateral changes.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unpublished, but the decision is noted at 108 F.3d 1392 (Table). The opinion of the Court of Federal Claims (Pet. App. 14a-190a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1997. A petition for rehearing was denied on May 2, 1997. Pet. App. 192a. The petition for a writ of certiorari was filed on July 31, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On February 25, 1985, the United States Defense Logistics Agency, Defense Personnel Support Center, awarded a contract to petitioner to produce 2,415,885 chemical protective suits (chemsuits) for $96,345,493.80. Pet. App. 18a. The contract contemplated the delivery of approximately 200,000 units per month, after the submission and approval of five sample articles, with a contract performance period of 672 days and a completion date of December 29, 1986. *Id.* at 22a, 26a. By January 6, 1989, 1,411 days after the contract was awarded, petitioner had delivered fewer than one-half of the chemsuits. *Id.* at 3a, 26a. During the performance period, the government issued 42 modifications and eight amendments to the contract, resulting in more than 100 specification changes to the chemsuit, although some of the changes were at petitioner's request. *Id.* at 2a, 143a-144a.

Following many of those changes, in July and October 1988, the parties mutually agreed to two substantial modifications of the ongoing contract. Pet. App. 2a, 4a-5a, 145a-146a. Pursuant to those modifications, petitioner agreed to produce the chemsuits according to the changed specifications, and the government agreed to extend the schedule for delivery of the suits and to pay petitioner on an accelerated schedule for work as delivered. *Id.* at 145a-146a, 176a.

Notwithstanding the relaxation of the delivery schedule and the accelerated payments, petitioner was unable to comply with its delivery requirements and was financially incapable of completing contract performance. Pet. App. 170a, 174a-177a, 181a. Accord-

ingly, the contracting officer terminated the contract for default on January 6, 1989. *Id.* at 2a-3a.

2. Petitioner then filed multiple suits that were consolidated in the United States Claims Court,[1] in which petitioner (1) challenged the government's termination for default and (2) argued that unilateral modifications made to the original contract by the government either (a) were outside the scope of the changes clause, thus justifying an award of anticipatory and other breach-of-contract damages under the cardinal change doctrine, or (b) if within the scope of the changes clause, justified an equitable adjustment. Pet. App. 1a-2a. Following an extensive trial, the court (1) upheld the termination for default and (2) found that, although the modifications made by the government were within the changes clause and thus did not amount to a cardinal change, they did warrant an equitable adjustment for delay and disruption costs attributable to the government.[2] In rejecting petitioner's cardinal change claim in favor of an equitable adjustment, the court explained:

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[1] On October 29, 1992, the United States Claims Court became the United States Court of Federal Claims. See Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Tit. IX, § 902(b), 106 Stat. 4516 (codified at 28 U.S.C. 171 note).

[2] Finding the government 36% solely responsible for disruptions and delays under the contract, the court determined that petitioner should receive an equitable adjustment of $10,071,617. Pet. App. 142a, 176a. That amount was subtracted from $19,288,649 owed by petitioner to the government for unliquidated progress payments that the government had made, and the court ultimately entered judgment for the government in the net amount of $9,217,032. *Id.* at 188a-189a.

> Notwithstanding the evidence supporting [petitioner's] plausible and potentially convincing cardinal change assertion, [petitioner's] position on this issue is fatally undercut by the bilateral modifications made to the delivery schedule in 1988. In modification P37, executed in late July 1988, Amertex agreed to produce and deliver the chempro suit, as then modified, under an extended schedule. Bilateral modification P41 in October 1988 increased the amount of DD250 payments and referenced the schedule agreed to in P37. In essence, Amertex promised to produce the modified chempro suit, with all changes which had been made to July 1988 and given the numerous other government-caused difficulties, on a schedule contemplating half the pace as the original contract.

Id. at 145a-146a. The court concluded that, "[b]ecause of [petitioner's] agreement to produce the modified suits, we find no cardinal change." *Id.* at 146a.

3. A divided panel of the court of appeals affirmed. Pet. App. 1a-13a. The court agreed with the trial court that, after executing the bilateral modifications, petitioner was barred from asserting that the government had breached the original contract. *Id.* at 4a-5a. The court explained that, by consenting to bilateral modifications that "replace[d] the parallel provisions of the original contract" and "included modifications to the delivery schedule and the payment scheme," petitioner also "implicitly agreed to a changed specification and added costs it accrued thereby." *Id.* at 4a. In effect, petitioner "implicitly agreed that the [prior unilateral] changes were within the changes clause of the contract," and that, therefore, the changes did not give rise to a cardinal

change claim. *Id.* at 5a. The court of appeals also affirmed the trial court's allocation of the delay costs and its decision to sustain the government's termination of the contract for default. *Id.* at 6a-8a.[3]

ARGUMENT

The unpublished decision of the court of appeals is correct and, in any event, does not warrant further review by this Court.

1. Pursuant to a standard "changes clause" like the one in the chemsuit contract at issue here, the government is permitted to make unilateral changes (subject to "an equitable adjustment in the contract price, the delivery schedule, or both"), so long as the changes are "within the general scope of [the] contract." 48 C.F.R. 52.243-1(a) and (b); Pet. App. 142a. Conversely, the government may be deemed in breach of contract under the cardinal change doctrine for imposing a change that is "so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for," and "so profound that it is not redressable under the contract." *AT&T Communications, Inc.* v. *Wiltel, Inc.*, 1 F.3d 1201, 1205 (Fed. Cir. 1993) (quoting *Allied Materials & Equip. Co.* v. *United States*, 569 F.2d 562, 563-564 (Ct. Cl. 1978)).

Although petitioner focuses exclusively on the question whether a waiver of an alleged cardinal change claim must be explicit, the opinions of the courts below, fairly read, are based on the fact-bound determination that no cardinal change occurred in

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[3] Judge Newman dissented. In her view, petitioner had not waived its breach-of-contract claim based upon a cardinal change to the original contract, since the bilateral modifications did not expressly waive that claim. Pet. App. 9a-13a.

this case at all.[4] The courts below correctly held that, after petitioner entered into a bilateral agreement that altered key terms of the original chemsuit contract (*e.g.*, delivery schedule and payment schedule) but implicitly incorporated the other terms (*e.g.*, the previously changed specifications of the chemsuit), petitioner's claim that the government's prior unilateral changes to the original contract so fundamentally altered that contract as to constitute a breach under the cardinal change doctrine was unsupported by the facts. In determining whether a cardinal change has occurred as a matter of fact, a court must consider the totality of the change, and "[e]ach case must be analyzed on its own facts and in light of its own circumstances, giving just consideration to the magnitude and quality of the changes ordered and their cumulative effect upon the project as a whole." *Air-A-Plane Corp.* v. *United States*, 408 F.2d 1030, 1033 (Ct. Cl. 1969). It was not clearly erroneous for the trial court to find that petitioner's agreement "to produce the modified chempro suit, with all the changes which had been made," was strong—and, on the disputed facts of this case, dispositive—evidence that the prior unilateral changes were not in fact outside the scope of the contract and thus did not constitute a cardinal change. Pet. App. 146a. Since there was no cardinal change, the issue of whether there was a waiver is irrelevant.

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[4] Indeed, the trial court did not discuss the concept of "waiver" at all in concluding that there was no cardinal change. The Federal Circuit used the term "waived" only once, imprecisely, in the introduction to its opinion. Pet. App. 2a.

2. Even if the court of appeals' decision were properly characterized as resting on grounds of waiver, it would not warrant review by this Court. The determination whether a non-breaching party has waived its breach claim "either expressly *or by conduct inconsistent with an intent to enforce that right*" (*Saverslak* v. *Davis-Cleaver Produce Co.*, 606 F.2d 208, 213 (7th Cir. 1979) (emphasis added), cert. denied, 444 U.S. 1078 (1980)) depends on the particular facts and context of the case. Here, petitioner did not merely continue to perform under the original contract; it took action that affirmatively ratified the prior changes to the contract. The totality of petitioner's conduct—its continuation of the contract, its explicit agreement to significant contract modifications that implicitly incorporated prior unilateral changes, and its failure at any time prior to termination of the contract to notify the government of its intent to bring a breach claim—was fundamentally inconsistent with any purported intent to preserve a breach-of-contract claim. Thus, it would have been justifiable for the courts below to find that petitioner waived its breach claim[5] and was left with

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[5] Petitioner's claim is also barred by the doctrine of estoppel, which is often subsumed in a waiver analysis. Unlike waiver, estoppel "focuses not on the obligor's intent, but rather on the *effects* of his conduct on the obligee." *Saverslak*, 606 F.2d at 213. A nonbreaching party is estopped from claiming breach when his "conduct misleads [the breaching party] to believe that a right will not be enforced and causes him to act to his detriment in reliance upon this belief." *Ibid.* Here, as the court of appeals noted, petitioner received a benefit ("an infusion of working capital that was needed in light of performance difficulties but that was not contemplated in the

only a claim for equitable adjustment.[6]

If the court of appeals' rejection of petitioner's cardinal change claim indeed hinged on a waiver theory, it might be in some tension with the decisions of other courts of appeals and even with the Federal Circuit's own precedents. Nonetheless, the decision does not merit this Court's review for at least two reasons. First, the decision is unpublished and therefore has no precedential value. Second, as the dissent points out, under that reading, the decision below may not be fully consistent with the Federal Circuit's own decision in *Laka Tool & Stamping Co.* v. *United States*, 639 F.2d 738 (Ct. Cl. 1980), cert. denied, 454 U.S. 1086 (1981), which held that a contractor did not waive its equitable adjustment claim

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original payment scheme") in exchange for its agreement to adhere to the newly modified contract, including the changed specifications. Pet. App. 5a. In agreeing to a more relaxed delivery schedule and an accelerated payment schedule, the government relied on the fact that petitioner was agreeing to the changed specifications (subject to equitable adjustment). The decisions of the courts below are in accord with the principle that a nonbreaching party that induces another party to alter its position in reliance on its assumption that the contract has not been breached is estopped from later claiming breach.

[6] Although petitioner relies (Pet. 5 n.3) on the provision in one of the bilateral modifications that "the execution of this modification will not be construed by either party as an endorsement by either party of any negotiation position with respect to the settlement of modifications P00001 and P00002," see Pet. Lodging App. 184, at most, that clause simply reserved petitioner's negotiating position for an equitable adjustment under the contract. It does not support and, indeed, is inconsistent with petitioner's present claim that the government's prior unilateral changes constituted a breach under the cardinal change doctrine.

by entering into an accord and satisfaction that settled some contractual disputes but did not contain an "express waiver" of the contractor's claim for an equitable adjustment due to excess costs. *Id.* at 743.[7] Since *Laka Tool* was a published decision, it is controlling circuit precedent. The unpublished decision in this case is not, and it therefore does not give rise to a concrete circuit conflict. Any tension between the decision in this case and *Laka Tool* should be resolved by the Federal Circuit in the first instance. At the present time, there is no reason for this Court to grant review.

3. Because petitioner's claim of cardinal change is not supported by the facts and, in any event, was probably waived, the courts below properly held that petitioner's sole remedy for any delays and disruptions that the government caused by those changes is an equitable adjustment of the contract.[8]

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[7] It is possible to distinguish *Laka Tool* from this case, for example, because it did not involve a cardinal change or any detrimental reliance by the government and because the contractor in that case would have been left without any remedy at all if its equitable adjustment claim were unavailable (whereas here, the absence of a cardinal change claim still leaves the equitable adjustment remedy). Moreover, if in fact the Federal Circuit had intended to dispose of the present case on the grounds of waiver, it is somewhat surprising that the court did not even cite *Laka Tool*.

[8] Petitioner does not contest in this Court the amount of the equitable adjustment awarded below. Nor does petitioner now contest the government's termination of the contract for default or the amount awarded by the courts below to the government, against which petitioner's award was offset.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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